Supreme Court, U.S.
D

94 523 SEP 19 1994

OFFICE OF THE CLERK

CAUSE NO.

IN THE

Supreme Court of the United States

October Term 1994

ROBERT DAVIS SR., PERSONAL REPRESENTATIVE of the ESTATE of ROBERT DAVIS JR.; and JANICE SCHNEIDER, PERSONAL REPRESENTATIVE of the ESTATE of MATTHEW SCHNEIDER; and JOHN BAUER, PERSONAL REPRESENTATIVE of the ESTATE of JOHN DIETERICH,

Petitioners,

versus

BENDER SHIPBUILDING and REPAIR, CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

---

* Counsel of Record:

* John G. Cooper, Esq.
James M. Beard, Esq. (Trial Counsel)
88 Spring Street Suite 500
Seattle, WA 98104
(206) 623-9900

aBCD Legal Printers, Seattle, Washington

52 pp

QUESTIONS PRESENTED FOR REVIEW

1) Is the Death on the High Seas Act, 46 U.S.C. 761, the exclusive remedy available for deaths occurring on the high seas or may the Death on the High Seas Act be supplemented by general maritime survival actions.

2) Should recovery to a decedent's estate, in a non-Jones Act death action, nonetheless be limited to those damages available under the Jones Act, solely because of decedent's status as a seaman?

PARTIES TO PROCEEDING

The Petitioners are the Personal Representatives of three crewmen who died when the F/T ALEUTIAN ENTERPRISE sank, they are: Robert Davis Sr. Personal Representative of the Estate of Robert Davis Jr.; Janice Schneider Personal Representative of the Estate of Matthew Schneider; and John Bauer Personal Representative of the Estate of John Dieterich.

The Respondent is Bender Shipbuilding and Repair Co., Inc. the Shipbuilder who constructed and performed repairs upon the F/T ALEUTIAN ENTERPRISE prior to the vessel's sinking.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES..... iv

REFERENCE TO OFFICIAL OPINIONS 1

JURISDICTION..... 1

STATUTES..... 2

STATEMENT OF THE CASE..... 3

ARGUMENT..... 6

APPENDIX A..... 1a

APPENDIX B..... 16a

TABLE OF AUTHORITIES

Cases **Page**

Azzopardi v. Ocean Drilling & Exp.
742 F. 2d 890, 1986 AMC 434
(5th Cir. 1984).....10

Davis v. Bender Shipbuilding & Repair Co.
27 F.3d 426 (9th Cir.1994).....1

Favaloro v. S/S Golden Gate
687 F. Supp 475 (N.D. Cal. 1987).....10

Garner v. Dravo Basic Materials Co.,
768 F. Supp. 192 (S.D. W. VA. 1991)....22

Higginbotham v. Mobil Oil Corp.
436 U.S. 618 (1978).....9, 10

Howard v. Crystal Cruises
1992 AMC 1645 (E.D. Cal. 1992).....11

McAleer v. Smith
739 F. Supp. 923 (D.R.I 1992).....12

Miles v. Apex Marine Corp.
498 U.S. 19, 111 S. Ct. 317
112 L. Ed 2d 275 (1990)
.....8, 9, 11-15, 17-19, 22

Mussa v. Cleveland Tankers
1992 AMC 2183 (E.D. Mich. 1992).....22

Rebstock v. Sonat Offshore Drilling
764 F. Supp. 75 (E.D. La 1991).....21

Sugden v. Puget Sound Tug and Barge
796 F. Supp. 455 (W.D. Wash. 1992)..18-21

Cases **Page**

Sutton v. Earles
26 F. 3d 903 (9th Cir. 1994).....16

CONSTITUTION AND STATUTES

U.S. Constitution Art. III Sec.1.....1

U.S. Constitution Art. III Sec. 2.....1

28 U.S.C. Sec 1254(1).....1

28 U.S.C. Sec. 1333(1).....2

46 U.S.C Sec. 688(a).....2, 3, 5

46 U.S.C. Sec. 761.....2, 5, 9

46 U.S.C. Sec. 762.....2, 9

CITATION TO THE OPINION OF THE NINTH CIRCUIT

The opinion of the Court of Appeals for the Ninth Circuit (Appendix A) is reported as Davis v. Bender Shipbuilding, 27 F. 3d 426 (9th Cir. 1994). The order of the District Court dismissing the Petitioners' complaint is unreported.

JURISDICTION

The Supreme Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1). The judgment of a panel of the United States Court of Appeals for the Ninth Circuit was entered on June 21, 1994. Article III, sec. 2 of the United States Constitution provides that the judicial power vested in the Supreme Court under Article III, sec. 1 extends to "all cases of admiralty and maritime jurisdiction..."

The District Court had original jurisdiction over this matter pursuant to 28 U.S.C. 1333(1).

STATUTES

The federal statutory provisions directly involved in this appeal are the Death On the High Seas Act, 46 U.S.C. 761-762 (hereinafter DOHSA) and the Jones Act, 46 U.S.C 688.

46 U.S.C. 761 states:

> Whenever the death of a person shall be caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from shore of any state, or the District of Columbia, or the territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person or corporation which would have been liable if the death had not ensued.

46 U.S.C. 762 states:

> The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

46 U.S.C. 688 states:

> Any seamen who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and i case of death of a seaman as a result of such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action in the case of railway employees shall be applicable. Jurisdiction in such cases shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

This case arises out of the sinking of the 143 foot catcher processor ALEUTIAN ENTERPRISE in the Bering Sea on March 22, 1990. Petitioners (sometimes hereinafter referred to as the "deceased crewmen" or "decedents") are the estates of three of the nine crewmen who died when they became trapped

in the vessel's hull as the vessel capsized and sank.

The deceased crewmen sought damages against the Respondent, Bender Shipbuilding and Repair Co. Inc. (hereinafter referred to as shipbuilder), alleging that the shipbuilder's negligence in the design and construction of the vessel caused their deaths. This action was brought under general maritime law seeking recovery of the decedent's lost future income. The decedent's complaint in relevant part states:

> "Plaintiffs now bring this action against a third party Defendant, Bender Shipbuilding, with who decedents had no employment employee relationship and decedents' status as seaman accordingly being immaterial seek damages solely under the General Maritime Law for lost future earnings and loss of accumulation of estate and thereby seek to be made whole." ...

The deceased crewmen did not (and could not) bring their action either under the Jones Act, 46 U.S.C 688, or under the Death on the High Seas Act, 46 U.S.C. 761 et seq.

For the purpose of this appeal, the facts alleged in the deceased crewmen's complaint (Appendix B) must be taken as true. The relevant facts alleged were as follows: (1) There existed no employer/employee relationship between the shipbuilder and the deceased crewmen; (2) the negligence of the shipbuilder in the design and construction of the vessel was the proximate cause of the vessel sinking and the crewmen's deaths; (3) the deaths occurred on the high seas; (4) the deceased crewmen were each capable of earning substantial sums of money in the future but for their deaths; (5) as a direct and proximate result of the shipbuilder's negligence the estates of the deceased crewmen have suffered "economic and pecuniary damages"; and (6) each of the deceased crewmen were single seaman without dependents.

ARGUMENT

I. REASONS FOR GRANTING THE PETITION

The Court of Appeals erred in holding the decedents' status as "seamen" precluded the them from obtaining general maritime survival damages against a shipbuilder who was not their employer. The decedents' status as "seamen" is totally immaterial to the determination of this case. "Seaman" status is only relevant in actions where a crewman brings an action against his Jones Act employer or alternatively seeks damages under the general maritime law for unseaworthiness; neither of these actions could be maintained against the Respondent shipbuilder in this case. Where a "seaman" sues a third party such as a shipbuilder who is not his employer his status a seamen is totally irrelevant and damages are not dictated by the Jones Act, but rather the general maritime law.

Nevertheless the Court of Appeals held:

> "We have recently held that survival claims for future earnings may be pursued in a case involving the death of a non-seaman in territorial waters. Sutton v. Earles, ___ F.3 d ___, No. 92-55548 (9th Cir. June 3, 1994). We said this was appropriate "where there is no applicable federal wrongful death statute imposing a damage limitation." Id., slip op. at 5940. Our decision in this case however, is controlled by Miles. The estates' decedents were seamen, and they perished on the high seas. The Jones Act does not permit the damages sought by the estates. DOHSA does not permit such damages either. We are therefore precluded from awarding them to the estates under general maritime law."

The Court of Appeals' decision affirming dismissal of Petitioner's complaint was clearly based upon the decedents' status as "seamen", combined with the erroneous conclusion that DOHSA preempts general maritime survival actions where the deaths occur on the high seas.

The Court of Appeals' holding that DOHSA preempts general maritime law survival actions is in direct conflict with prior decisions of

the Ninth Circuit Court of Appeals, decisions of the Fifth Circuit Court of Appeals, and numerous decisions of Federal District Courts. This Court should accept certiorari to resolve these conflicts within and amongst the Circuit Court of Appeals and District Courts.

The Court of Appeals' affirmation of the District Court's restriction of Petitioners' damages otherwise available against a shipyard because of the Petitioners status as "seamen" is based upon an erroneous interpretation of Miles v. Apex Marine Corp., 498 U.S. 19 (1990), and the failure of the district court to properly administer its admiralty powers such that the error calls for an exercise of the Supreme Court's power of supervision and guidance.

A. THE DEATH ON THE HIGH SEAS ACT DOES NOT PREEMPT GENERAL MARITIME SURVIVAL ACTIONS

The Court of Appeals held that DOHSA, 46 U.S.C. 761-62, combined with the Jones Act, precludes a general maritime survival action,

because decedents were "seamen" even though Petitioners were suing a third party shipbuilder who was not the decedents' employer.

DOHSA is a wrongful death statute and does not address survival claims. This Court in Miles 112 L. Ed. 2d 275, at 293 decisively declared: "At the Federal level, DOHSA contains no survival provision . . ." and refrained from deciding whether or not a general maritime survival action existed. Justice Stevens stated in Higginbotham v. Mobile Oil Corp., 436 U.S. 618, 625:

> "There is a basic difference between filling the gap left by congress' silence and rewriting rules that congress has affirmatively and specifically enacted."

Because DOHSA is a wrongful death statute and does not address survival actions the court below should have properly filled the gap left by Congress with a general maritime survival action.

The Fifth Circuit's decision in Azzopardi v. Ocean Drilling, 742 F.2d 890 (5th Cir. 1984) fully analyzed the issue of whether DOHSA preempts a general maritime survival action. Adopting the gap filling analysis of Higginbotham, the Fifth Circuit concluded that DOHSA does not preempt general maritime law survival actions.

In contrast to the Ninth Circuit's decision below, many district courts have permitted general maritime law survival damages to supplement DOHSA. In Favaloro v. S/S Golden Gate, 687 F. Supp 475 (N.D. Cal. 1987), the deceased crewmen of a fishing vessel sued a tanker that had sank their vessel on the high seas. The deceased crewmen's estates sought to supplement the DOHSA claims with a claim for pre-death pain and suffering under a general maritime survival action. Favaloro held that where there is no Jones Act claim, DOHSA may be

supplemented with a general maritime survival action.

In Howard v. Crystal Cruises, 1992 AMC 1645 (E.D. Cal. 1992) the decedent was injured while disembarking from a cruise ship in a foreign port and subsequently died from his injuries. His wife and children brought suit under DOHSA for wrongful death benefits, and under a general maritime law survival action for pre-death pain and suffering and loss of earnings. Howard, at 1651, first rejects the argument that Miles prohibited general maritime survival actions and then goes on to hold:

> The court follows Azzopardi, Ninth Circuit dicta, and the weight of other authority, and holds that DOHSA is not a bar to survival actions. Although there is an argument to be made that Congress would have provided a statutory survival cause of action if it had intended for plaintiffs to recover for survival damages, the court is more persuaded by the gap-filling analysis of Azzopardi. The reasoning in Azzopardi is consistent with the Supreme Court's approach in Moragne. Thus, when Congress fails

> to provide a statutory recovery, the courts may look to general maritime law to supplement statutory provisions. On the other hand, when Congress has provided specific, albeit limited, remedies the courts are not free to create additional remedies. In this case, Congress has not provided a remedy. It has simply left the area unaddressed. In keeping with Moragne, the court finds that Congress' failure to provide any survival remedy in DOHSA does not evince and intent that no such remedy be provided. For these reasons, and in light of the clear weight of authority, the court finds that Howard's survival action under general maritime law is not precluded by DOHSA.

See also: McAleer v. Smith, 791 F. Supp 923 (D.R.I. 1992).

The general maritime law survival action must be an integral part of the damage framework in admiralty cases. Failure of the appellate court to hold that the general maritime law may supplement and fill the legislative gaps left by DOHSA was clear error. It is respectfully requested that the Court grant this Petition for Certiorari to clearly define the federal court's powers and

obligations as courts in admiralty to fill the gaps left by legislation such as DOHSA. Accepting this Petition will settle the disputes and uncertainties as to federal maritime law that now exist between the circuits and within the district courts.

B. MILES V. APEX DOES NOT APPLY TO NON-SEAMAN THIRD PARTY CLAIMS

In delivering the opinion of this Court in Miles, Justice O'Conner framed the issues in Miles as follows:

> "We next must decide whether, in a general maritime action surviving the death of a **seaman**, the estate can recover decedent's lost future earnings." (emphasis added)

Miles 112 L.Ed. 2d at 292 specifically "declined" to address the issue of whether, under the general maritime law, there existed a survival action which included a claim for loss of future earnings. Instead the Court determined that the Jones Act preempted a seaman from obtaining greater damages against his employer under the general maritime law

than were provided for under the Jones Act. This Court stated:

> Because Torregano's estate cannot recover for his lost future income under the Jones Act, it can not do so under the general maritime law.

After exploring the policy reasons for not permitting a general maritime survival action for loss of accumulation of estate Miles goes on to declare:

> "This fact alone would not necessarily deter us, if recovery of lost future income were more consistent with the general principles of maritime tort law. There are indeed strong policy arguments for allowing such recovery. See e.g. R. Posner, Economic Analysis of Law 176-181 93d ed. 1986) recovery of lost future income provides efficient incentives to take care by insuring that the tortfeasor will have to bear the total cost of the victim's injury or death. Moreover, Miles reminds us that admiralty courts have always showed a special solicitude for the welfare of seamen and their families. "[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than withhold the remedy." Moragne, supra, at 387, quoting Chief Justice Chase in The Sea Gull, 21 F. Cas. 909, 910 (No.

12,578) (CC Md. 1865) See also Gaudet, 414 U.S., at 583.

We are not unmindful of these principles, but they are insufficient in this case. We sail in occupied waters. Marine tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in survival actions which we cannot exceed. **Because this case involves the death of a seaman, we must look to the Jones Act.**

The Jones Act/FELA survival provisions limits recovery to damages suffered during the decedent's lifetime." (emphasis added)

Clearly the Plaintiff's status as a seaman was the fulcrum for this Court's decision in Miles. The Court's holding dictates that by suing under the general maritime law a Jones Act seaman cannot obtain greater damages against his employer than provided for under the legislative scheme created by the Jones Act. It does not follow, however, that a Jones Act seaman cannot recover greater damages than those enumerated

in the Jones Act against a third party who is not his employer. Such a result simply defies logic. Notably, shore-side employees injured on the job are routinely permitted to recover damages in third-party actions greater than those provided for by statute against their employer under the longshore and workers compensation systems.

In Sutton v. Earles 26 F.3d 903 (9th Cir. 1994), issued just two weeks prior to the Ninth Circuit's opinion in this case, the Ninth Circuit adopted an interpretation of Miles limiting the case to Jones Act cases only and allowed a Evich general maritime law survival action for loss of accumulation of estate. In Sutton the Plaintiffs died in a pleasure boat accident within state territorial waters. Accordingly, the Plaintiffs were not Jones Act seamen. Sutton held:

> We do not consider the vitality of Evich as applied in the circumstances of this case to have

> been called into doubt by the Supreme Court's holding that a decedent-seaman's estate may not supplement the remedies of the Jones Act, which preclude recovery for lost future income, through maintenance of a general maritime cause of action. Miles 498 U.S. at 36. First, the Court clearly rested its decision in Miles on the existence of the Jones Act's limitation on remedies - a limitation not present in this case. Id Moreover, the Court was influenced by the nature of the supplemental general maritime action in that case, an unseaworthiness action which does not require a finding of fault. Id (The Jones Act limitation of survival remedies for injuries resulting from negligence "forecloses the more expansive remedies in a general maritime action founded on strict liability.")

In this appeal the Court of Appeals failed to recognize that the identity of the shipyard as a non-employer of the Petitioners clearly distinguishes this case from the limitation on damages set forth Miles. The Court of Appeals found that the "identity of the defendant is irrelevant" to determination of the type of damages that are available. This is plain error in determination of a

federal question involving the admiralty powers of the Court.

Unlike the appellate court's decision which is the subject of the petition, many district courts have held that Miles does not to apply to general maritime law third party actions such as this suit against the shipbuilder. The issue was addressed in Sugden v. Duwamish Shipyard, 796 F. Supp. 455 (W.D. Wash. 1992) where the court held Miles applied only to suits against the Jones Act employer and not to a suit involving a third party shipbuilder. In Sugden, a Jones Act seaman died allegedly as the result of the negligence of the Duwamish shipyard. The deceased seaman's wife claimed damages for loss of society. Miles, 112 L.Ed 2d 275, 291 had ruled that a seaman could not supplement his Jones Act claim with a general maritime law claim for loss of society.

Relying upon Miles, the Duwamish shipyard moved to dismiss the claim for loss of

society. Interpreting Miles, the district court stated that "the primary focus of the Court's reasoning in Miles was the need for uniformity among the various actions for wrongful death of a seaman, whether brought under the Jones Act, DOHSA, or general maritime law." Accordingly, Sugden held:

> "But the Court in Miles did not reach the issue in the case at bar. Plaintiff here concedes she has no right to non-pecuniary damages from her late husband's employer, Puget Sound Tug and Barge. Rather, plaintiff here seeks non-pecuniary damages only from Duwamish Shipyards, a non-employer, under general maritime law. Both parties also agree that the shipyard owed the decedent, as the employee of a third party, a duty of reasonable care under the circumstances. Peters v. Titan Navigation Co., 857 F.2d 1342 (9th Cir. 1988). Finally, it is beyond dispute that a seaman has no cause of action under the Jones Act against a party other than his or her employer. Rodriguez v. Flota Mercante Grandcolombiana, S.A., 703 F.2d 1069 (1983); Perkins v. Union Barge Line Corp., 373 F.2d 714 (6th Cir. 1967).
>
> These principles of law illustrate that the concern for uniformity that motivated the Supreme Court in Miles does not exist in this case.

> Plaintiff's husband was, in effect, not a Jones Act seaman for purposes of this suit against Duwamish. Duwamish's duty of care to plaintiff was less than a Jones Act employer's to its employees under either the Jones Act or the general maritime law. In short, the principles the Court announced in Gaudet, and not Miles, control here. See, e.g., Rebstock v. Sonat Offshore Drilling, 764 F. Supp. 75 (E.D. La. 1991).

Like the plaintiff in Sugden, the Petitioners here are, in effect, not Jones Act seamen for purposes of their suit against the shipbuilder.

Importantly, Sugden, at 457, notes inherent differences between a seaman's claim based upon Jones Act negligence and unseaworthiness in comparison to a third party general maritime law negligence claim. A shipbuilder owes a crewman a lesser duty of care than a employer owes to his seaman. Furthermore, the burden of proof is substantially different between a Jones Act case and general maritime negligence case.

Perhaps even more remarkable are the duties and obligations of a Jones Act employer compared to the third party shipbuilder. The Jones Act employer must pay maintenance and cure and wages until the end of the voyage to an injured seaman regardless of fault. If remedies are to be uniform, as the shipyard argues, so must be the elements of the cause of actions and the obligations of the parties to one another.

Similar to Sugden, the district court in Rebstock v. Sonat Offshore Drilling 764 F. Supp. 75 (E.D. La. 1991) held that Miles had no application to a Jones Act seaman's case against a third party:

> "In the present case the plaintiffs have not asserted a Jones Act claim. The plaintiffs have asserted a general maritime law negligence action against a third party. Mr. Rebstock's status as a Jones Act seaman has no relevance in connection with this suit. Recovery under the general maritime law of negligence is essentially the same as under the common law, and loss of consortium damages are recoverable. The facts of the present case are

> similar to a Fifth Circuit case in which the spouse of a seaman who asserted a general maritime law negligence claim against a third party was allowed to recover damages for loss of consortium. Tullos v. Resource Drilling Co., 750 F. 2d 380, 386 (5th Cr. 1985). Because Miles v. Apex and its progeny do not affect Tullos holding on this issue, the court finds that Mrs. Rebstock should be allowed to pursue her claim against the defendants.

Other District Court cases squarely at odds with the Court of Appeals include the following: Garner v. Dravo Basic Materials Co., 768 F. Supp. 192 (S.D. W. Va. 1991) and Mussa v. Cleveland Tankers 1992 AMC 2182 (E. D. of Mich. 1992).

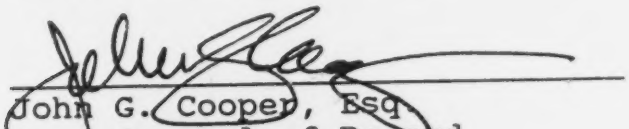
Proper interpretation of Miles limits the case to instances involving Jones Act seamen's suits against their Jones Act employers. Where a seaman sues a third party shipbuilder the scope of his damages is to be determined by general maritime law.

CONCLUSION

The decision of the court of appeals is in conflict with the law of its own circuit,

several other circuits and numerous district courts. The present petition for a writ of certiorari should therefore be granted.

Respectfully submitted,



John G. Cooper, Esq.
Counsel of Record
Stafford Frey Cooper
500 Watermark Tower
88 Spring Street
Seattle, Washington 98104
(206) 623-9900

James M. Beard, Esq.
5006 20th Ave. N.W.
Seattle, Washington 98107
(206) 784-5830

September 19, 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-36826

Robert Davis Sr., Personal Representative of the Estate of Robert Davis Jr.; Janice Schnieder, Personal Representative of the Estate of Matthew Schneider; and John Bauer, Personal Representative of the Estate of John Dieterich,

Plaintiffs-Appellants

v.

Bender Shipbuilding and Repair Co., Inc.,

Defendant-Appellee

Filed June 21, 1994

Before Alfred T. Goodwin, Mary Schroeder and William A. Norris, Circuit Judges

Opinion by Judge Schroeder

This is an appeal by the estates of seamen who drowned in the Bering Sea after becoming trapped in the hull of a sinking vessel. The estates seek to recover damages for lost future earnings from the ship's

builder, Appellee Bender Shipbuilding, under federal general maritime law.

In Evich v. Connelly, 759 F.2d 1432 (9th Cir. 1985) (Evich I), we held that the non-dependant survivors of a deceased seaman could pursue a general maritime survival action against the owner of the seaman's vessel. Following our remand to the trial court in Evich I, we held that lost future earnings is a permissible measure of damages in some general maritime survival actions. Evich v. Morris, 819 F.2d 256 (9th Cir.) cert. denied, 484 U.S. 914 (1987) (Evich II). We now hold that our decision in Evich II, insofar as it bears on the case now before us, is no longer controlling authority because it has been partially overruled by Miles v. Apex Marine Corp. 498 U.S. 19 (1990)

I.

The tragic facts of this case are straightforward and undisputed. On March 23, 1990, nine crewmen died after becoming trapped

in the hull of the vessel ALEUTIAN ENTERPRISE as it sank in the Bering Sea. The estates of the deceased crewmen brought claims against the owners of the vessel and the employer of the crewmen in federal district court in the Western District of Washington. These claims were settled. Thereafter, the estates of three of the crewmen ("the estates") brought this suit against Bender, the shipbuilder, alleging that Bender's negligence in designing and constructing the vessel caused the death of the crewmen.

The three crewmen died without dependent heirs. Because estates may not pursue wrongful death claims for loss of support or for other personal injuries that could be recovered by heirs, the estates seek to pursue a survival action for the lost future income the crewmen would have received but for Bender's alleged negligence. The estates do not rest their survival claim on any statutory basis. Instead, they invoke the general maritime law.

The district court granted Bender's motion to dismiss, finding that the estates claims were foreclosed by the Supreme Court's decision in Miles v. Apex 498 U.S. 19 (1990). The estates appeal.

II.

Recovery for maritime deaths is governed by a patchwork of state law and both federal statutory law and common law. In the early twentieth century, the legislatures of most of the states rejected the common law proscription of wrongful death actions, enacting wrongful death statues. See Miles 498 U.S. at 23. Similarly, in 1920, Congress enacted two maritime wrongful death statutes; the Jones Act, codified at 46 U.S.C. App. Sec. 688 (1988), and the Death On the High Seas Act (DOHSA), codified at 46 U.S.C. App. Secs. 761-67 (1988).

The Jones Act creates a cause of action for the wrongful death of seamen. Liability under the Jones Act is determined in

accordance with the statutes governing injuries to railroad employees. 46 U.S.C. App Sec. 688(a); Evich I, 759 F.2d at 1433. Jones Act claims may be pursued by surviving spouses, children, or dependent next of kin, 45 U.S.C. Sec. 51 (incorporated through 46 U.S.C. App. 688(a)); Evich I, 759 F.2d at 1433, and the only proper defendant in a jones Act action is the seaman's employer. See, e.g., The Norland, 101 F.2d 967, 971 (9th Cir. 1939). Negligence is the only basis for liability under the Jones Act.

DOHSA also creates a wrongful death cause of action for maritime deaths. Unlike Jones Act claims, DOHSA claims may be brought by dependent heirs on behalf of anyone who has died at sea, not just seamen. See Miles, 498 U.S. at 24. In addition, DOHSA claims may be pursued against defendants other than employers. See 46 U.S.C. App. Sec. 761. DOHSA, however, provides a remedy only for death on the high seas, not for death in state

territorial waters, the waters within one marine league from shore. Id.[1]

For several years, DOHSA and the Jones Act effectively complemented state wrongful death statutes, ensuring some measure of recovery for almost all wrongful maritime deaths. The Jones Act provided for recovery for the death of seamen, whether killed in state waters or on the high seas. Designated heirs of deceased longshoremen and other civilians could bring suit either under DOHSA or under a state wrongful death statute, depending on whether death occurred on the high seas or in state waters. Miles, 498 U.S. at 24-25. Anomalies developed, however, as federal courts began to recognize "unseaworthiness as a basis for

---

[1] The heirs of a seaman who has died on the high seas may pursue a claim under DOSHA or the Jones Act. Doyle v. Albatross Tanker Corp., 367 F.2d 465 (2d Cir. 1966); see Miles, 498 U.S. at 29; see also E. L. Kellett, Annotation, Death on the High Seas Act: Right to Recover for Death of Seaman as Affected by Jones Act, 22 A.L.R.3d 852 (1968).

basis for recovery in DOHSA actions. Id. at 25-26 (discussing Manich v. Southern S.S. Co., 321 U.S. 96 (1944) and Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946)). In an unseaworthiness claim, the owner of a vessel is held strictly liable for failing to provide a safe ship. No showing of negligence, or any fault at all, is required. Id. at 25. As a consequence of the attractiveness of no-fault liability, "unseaworthiness became the principal vehicle for recovery" for maritime deaths. Id. at 25-26 (citing Moragne v. States Marines Lines, Inc., 398 U.S. 375, 399 (1970)). But because DOHSA does not apply to deaths in territorial waters, unseaworthiness claims were available only when the death occurred on the high seas or the territorial waters of one of the minority of states recognizing such a remedy. See id. at 26-27. In most states, recovery for deaths in territorial waters required a showing of negligence.

This was the problem facing the plaintiff in Moragne v. States Marine Lines, Inc. 398 U.S. 375 (1970). The decedent in Moragne was a longshoreman killed while on board a vessel docked in Florida state waters. The plaintiff, decedent's widow, sought to pursue an unseaworthiness claim but was unable to do so. Florida, like most states at the time, did not recognize unseaworthiness claims under its wrongful death statute, and DOHSA did not apply because the longshoreman had perished in state waters. Overruling The Harrisburg, 119 U.S. 199 (1886), the Supreme Court recognized a general maritime unseaworthiness claim. The Court reasoned that there was no longer a valid basis for The Harrisburg's rejection of general maritime wrongful death claims in light of the universal acceptance of wrongful death by state legislatures and by Congress. Moragne, 398 U.S. at 388-98.

Of critical importance to the Court in Moragne was a need for uniformity. The Court

rejected the notion that DOHSA 's application only to death on the high seas evinced a congressional intent to foreclose federal claims brought on behalf of non-seamen who perished in state waters. The Court found that both DOHSA and the Jones Act represent a manifestation of Congress' intent to create uniformity in admiralty jurisdiction by legislation. Id. at 400-01. In light of the nonuniformities created by the emergence of unseaworthiness claims, the Court found that Congress' preference for uniformity could only be served by recognizing a general maritime unseaworthiness claim for the death of longshoremen in state waters. Miles, 498 U.S. at 26-27 (discussing Moragne, 398 U.S. at 402); Barbe v. Drummond, 507 F.2d 794, 800 (1st Cir. 1974). The Court in Moragne also strongly suggested that the "humane and liberal character" of proceedings in admiralty favors a liberal extension of remedies for maritime deaths unless such remedies are

expressly foreclosed by Congress. Moragne, 398 U.S. at 386-87.

In the wake of Moragne, several courts of appeal, including this one, found that Moragne supported recognition of general maritime survival actions in addition to wrongful death claims. E.g., Evich I, 759 F.2d at 434 (Ninth Circuit); Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890 (5th Cir. 1984); Barbe, 507 F.2d at 799-800 (First Circuit); Spiller v. Thomas M. Lowe, Jr. & Assocs., 466 F.2d 903 (8th Cir. 1972). In a survival action, a decedent's estate may recover damages on behalf of the decedent for injuries that the decedent has sustained. In a wrongful death action, by comparison, the decedent's dependents may only pursue claims for personal injuries that they have suffered as a result of a wrongful death. Miles v. Melrose, 882 F. 2d 976, 985 (5th Cir. 1989), aff'd, 498 U.S. 19 (1990).

Recognition of the general maritime survival action has provided a remedy to decedents' estates, who otherwise might not have had standing under the Jones Act or DOHSA to bring suit, Evich I, 759 F.2d at 1434, and has expanded the scope of damages recoverable for maritime deaths beyond that permitted under the Jones Act or DOHSA, see Evich II, 819 F.2d at 258; Azzopardi, 742 F.2d at 892-94; Barbe, 507 F.2d at 798-800. In Evich II, we held that a claim by a seaman's estate for lost future earnings survived the seaman's death and such damages could be recovered in a general maritime action, at least in a case in which there is no potential for double recovery by wrongful death beneficiaries also seeking loss of support damages. Evich II, 819 F.2d at 258. We reasoned that although most states do not permit recovery for lost future earnings in survival actions, such recovery "'better becomes the humane and liberal character of proceedings in admiralty,'" id.

(quoting Moragne, 398 U.S. at 387), and "prevents the anomaly of rewarding a petitioner for killing his victim rather that injuring him," id.

[1] However, three years after we decided Evich II, the Supreme Court returned to the subject in Miles. The plaintiff's principal contention in Miles was that Moragne should be interpreted broadly to recognize general maritime survival actions for lost future earnings, as this court had done in Evich I and Evich II. The Court began its analysis by reaffirming Moragne, holding that there exists a general maritime cause of action for wrongful death of seamen. Miles, 498 U.S. at 27-30. The Court then turned to the issue of the damages available in such an action. The Court expressly declined to decide whether survival actions are foreclosed per se under general maritime law, leaving Evich I intact. Id. at 34. The Court instead decided that even if general maritime survival actions are

permissible, lost future earnings cannot be recovered under federal maritime law, if, as was the circumstance in Miles, the plaintiff represents a deceased seaman. Id. at 35-36. The Court reasoned that because Congress has limited the survival right in the Jones Act to injuries sustained during the seaman's lifetime, more expansive remedies may not be recovered on behalf of a seaman under federal general maritime law. The Court bolstered its conclusion by noting that the states, like Congress, were reluctant to recognize survival actions for lost future income. Id. at 35.

[2] We have recently held that survival claims for lost future earnings may be pursued in a case involving the death of a non-seaman in state territorial waters. Sutton v. Earles, ___ F.3d ___, No. 92-55548 (9th Cir. June 3, 1994). We said this was appropriate "where there is no applicable federal wrongful death statute imposing a damage limitation." Id., slip op. at 5940. Our decision in this case,

however, is controlled by Miles. The estates' decedents were seamen, and they perished on the high seas. The Jones Act does not permit the damages sought by the estates. DOHSA does not permit such damages either. We are therefore precluded from awarding them to the estates under general maritime law.

[3] The plaintiffs attempt to distinguish this case from Miles by stressing that the defendant in this case is the shipbuilder, not a "Jones Act defendant." Yet there is nothing in Miles' reasoning to suggest that the decision turned upon the identity of the defendant. Indeed, one of the defendants in Miles was the shipbuilder. Miles, 498 U.S. at 21. Moreover, the principle underlying the Supreme Court's decision in both Miles and Moragne is that general maritime law is intended to supplement the statutory remedies created by Congress, not to enhance or replace them. Miles instructs the lower federal courts that a claim for lost future earnings is not

available in connection with a maritime death for which Congress has already provided a remedy and has excluded such damages. The identity of the defendant is irrelevant to these considerations.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
OF ALASKA

ROBERT DAVIS SR., PERSONAL REPRESENTATIVE of the ESTATE of ROBERT DAVIS JR.; and JANICE SCHNEIDER, PERSONAL REPRESENTATIVE of the ESTATE of MATTHEW SCHNEIDER; and JOHN BAUER, PERSONAL REPRESENTATIVE of the ESTATE of JOHN DIETERICH	)
PLAINTIFFS,	)
VS	)
BENDER SHIPBUILDING and REPAIR, CO., INC.,	)
DEFENDANTS.	)

COME NOW the Plaintiffs and for cause of action against the Defendants allege:

1. JURISDICTION: These cases are General Maritime Law survival actions brought by the Personal Representatives of the Estates of crewman who died when the ALEUTIAN ENTERPRISE

sank in the territorial waters of the United States of America, said action being brought against the Defendant who is alleged to have negligently designed, installed and built components of the ALEUTIAN ENTERPRISE. Jurisdiction is vested pursuant to Admiralty and Maritime Law and 28 U.S.C. 1333.

2. Procedural Setting: Following the sinking of the ALEUTIAN ENTERPRISE the owners of the vessel filed a Petition for Limitation of Liability in the United States District Court for the Western District of Washington cause number C90-594. Each of the Plaintiffs named above filed claims in the limitation action. Plaintiffs' claims against the owners of the ALEUTIAN ENTERPRISE and against their Jones Act employer have been settled. Under the holding of Miles v. Apex Marine Plaintiffs' estates were prohibited from recovering damages for future earnings or loss of accumulation of estate against their Jones Act employer or the owner of the vessel

because of Plaintiffs seaman status. Plaintiffs now bring this action against a third party Defendant, Bender Shipbuilding, with who decedents had no employment employee relationship and decedents' status as seaman accordingly being immaterial seek damages solely under the General Maritime Law for lost future earnings and loss of accumulation of estate and thereby seek to be made whole.

3. Identity of Plaintiff Estate of Davis: Robert Davis Sr. is the duly appointed Personal Representative of the Estate of Robert Davis Jr. At the time of his death Robert Davis Jr. was 26 years old and capable and able of making substantial sums of money in the future had he survived. Robert Davis Jr. was not married and had no children, he is survived by his mother, father, sister and brother.

4. Identity of Plaintiff Estate of Schneider: Janice Schneider is the duly appointed Personal Representative of the

Estate of Matthew Schneider. At the time of his death Matthew Schneider was 22 years old and capable and able of making substantial sums of money in the future had he survived. Matthew Schneider was not married and had no children, he is survived by his father, step-mother, sisters and brothers.

5. Identity of Plaintiff Estate of John Dieterich: John Bauer is the duly appointed Personal Representative of the Estate of John Dieterich. At the time of his death John Dieterich was 31 years old and capable and able of making substantial sums of money in the future had he survived. John Dieterich was not married and had no children, he is survived by his mother.

6. Identity of Defendant Bender Shipbuilding: The Defendant Bender Shipbuilding and Repair Co., Inc. is a corporation engaged in the business of designing, constructing, and converting fishing vessels and component parts and

apparatus for fishing vessels. Defendant has substantial contacts with and does business within the State of Alaska and designs, constructs and converts vessels including the ALEUTIAN ENTERPRISE for use as fish catcher processors in the territorial waters of the United States in the Bering Sea.

7. In 1983 and 1984 Defendant Bender Shipbuilding and Repair Co., Inc. at the request of the owners of the ALEUTIAN ENTERPRISE was responsible for the design, alteration, conversion, construction, and modification of the ALEUTIAN ENTERPRISE for use as a factory trawler.

8. United States Coast Guard Casualty Investigation: Following the sinking of the ALEUTIAN ENTERPRISE the United States Coast Guard conducted an extensive casualty investigation into the causes of the sinking of the vessel. The Marine Casualty Report issued by the Coast Guard identifies flooding through openings in the port side shell of the

ALEUTIAN ENTERPRISE at the factory deck level as being the cause of the capsizing and subsequent sinking. The openings in the port side shell were not designed, installed or constructed in accordance with reasonable safe maritime guidelines and requirements.

9. Liability: On or about March 22, 1990 the ALEUTIAN ENTERPRISE sank in Latitude 56 degrees, 13′ 22" North, Longitude 169 degrees, 48′ 56" West in the Bering Sea. On board the vessel at the time of her sinking were Robert Davis Jr., John Dieterich and Matthew Schneider all of whom were lost at sea and presumed drowned. The sinking of the ALEUTIAN ENTERPRISE and the deaths of Robert Davis Jr., John Dieterich and Matthew Schneider were the result of improperly designed, placed, installed and constructed openings in the port side shell including but not limited to openings for the fish discharge chutes. Based upon information and belief it is alleged that Defendant Bender Shipbuilding and Repair Co.,

Inc. was responsible for the oversight and installation, design, location, construction and modification of the openings in the port side shell of the ALEUTIAN ENTERPRISE and Defendants' negligence in this respect and others that may be subsequently discovered was the legal and or proximate cause of the deaths of Matthew Schneider, John Dieterich and Robert Davis Jr.

10. Damages: As a legal and or proximate cause of Defendants' alleged negligence decedents Robert Davis Jr., John Dieterich and Matthew Schneider and their estates have suffered economic and pecuniary damages. These damages include but are not limited to the future earnings that each of these decedents would have made had they not died. Prior to their deaths each of the decedents were capable of earning substantial incomes and their earnings would have continued to grow and increase as each of the decedents became older.

WHEREFORE, Plaintiffs each pray for judgment against the Defendants for damages for the future earnings that decedents Robert Davis Jr., John Dieterich and Matthew Schneider would have made but for their deaths in accordance with the evidence to be presented at the time of trial together with taxable costs and interest.

Dated this 19th day of March, 1992.

/s/
James M. Beard
Attorney for the Plaintiffs

/s/
Stan Lewis
Birch Horton Bittner & Cherot
1127 West Seventh Avenue
Anchorage, Alaska 99501
(907) 276-1550
Local Counsel for Plaintiffs

Supreme Court, U.S.
FILED
OCT 18 1994
OFFICE OF THE CLERK

No. 94-523

In The

Supreme Court of the United States

October Term, 1994

ROBERT DAVIS, SR., PERSONAL REPRESENTATIVE of the ESTATE of ROBERT DAVIS, JR.; and JANICE SCHNEIDER, PERSONAL REPRESENTATIVE of the ESTATE of MATTHEW SCHNEIDER; and JOHN BAUER, PERSONAL REPRESENTATIVE of the ESTATE of JOHN DIETERICH,

Petitioners,

vs.

BENDER SHIPBUILDING and REPAIR CO., INC.,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

BLANE H. CRUTCHFIELD*
BRIAN P. MCCARTHY
*Counsel of Record

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
Post Office Box 123
Mobile, Alabama 36601
Phone: (205) 432-5511

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether the estates of Jones Act seamen who perished on the high seas can recover damages for the decedents' lost future earnings in a general maritime survival action brought against a non-Jones Act employer?

PARTIES TO PROCEEDING

Respondent Bender Shipbuilding and Repair Co., Inc. adopts the listing of parties set forth in the Petition for Writ of Certiorari. Pursuant to Rule 29.1, Sup. Ct. R., Respondent represents that it has no parent companies, subsidiaries or affiliates that have issued shares to the public.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CITATIONS TO OPINIONS BELOW 1

JURISDICTION 1

APPLICABLE STATUTES 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT/REASONS WHY THE WRIT SHOULD BE DENIED 4

I. *MILES v. APEX MARINE CORP.* CONTROLS THE INSTANT CASE, AND CERTIORARI IS NOT NECESSARY TO REVISIT THE ISSUES RAISED HEREIN 4

II. PETITIONERS MAY NOT RECOVER DAMAGES FOR LOST FUTURE EARNINGS OR LOSS OF ACCUMULATION OF ESTATE UNDER A GENERAL MARITIME LAW SURVIVAL ACTION BECAUSE THE CLAIMS ARISE OUT OF DEATHS ON THE HIGH SEAS 8

III. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER UNITED STATES COURT OF APPEALS OR STATE COURT OF LAST RESORT 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Azzopardi v. Ocean Drilling & Exploration Corp., 742 F.2d 890 (5th Cir. 1984) 16, 17

Davis v. Bender Shipbuilding & Repair Co., Inc., 27 F.3d 426 (9th Cir. 1994) 9

Denniston v. Boeing Company, 1991 AMC 2080 (N.D. N.Y. 1991) 11, 12

Garner v. Dravo Basic Materials Co., 768 F.Supp. 192 (S.D. W.Va. 1991) 12, 13

Law v. Sea Drilling Corp., 523 F.2d 793 (5th Cir. 1975) 14

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) ... *passim*

Miles v. Melrose, 882 F.2d 976 (5th Cir. 1989), *aff'd*, 498 U.S. 19 (1990) 17

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) 4, 5, 9

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) 14

Mussa v. Cleveland Tankers, 802 F.Supp. 88 (E.D. Mich. 1992) 12, 14

Preston v. Frantz, 11 F.3d 357 (2d Cir. 1993) ... 9, 10, 11, 17

Rebstock v. Sonat Offshore Drilling, 764 F.Supp. 75 (E.D. La. 1991) 12, 13

Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc., 466 F.2d 903 (8th Cir. 1972) 14

TABLE OF AUTHORITIES – Continued

Page

Sugden v. Puget Sound Tug & Barge Co., 796 F.2d 455 (W.D. Wash. 1992) 12, 13

Sutton v. Earles, 26 F.3d 903 (9th Cir. 1994) .. 12, 13, 15, 16

Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084 (2d Cir. 1993) 9, 10, 11

STATUTES AND RULES

46 U.S.C. §§ 181-189 (1988) 2

46 U.S.C.app. § 688 (1988) 1

46 U.S.C.app. §§ 761-68 (1988) 1

Rule 10, Sup. Ct. R. 16

Rule 12(b), Fed. R. Civ. P. 2

CITATIONS TO OPINIONS BELOW

Respondent adopts the citations to opinions set forth in the Petition for Writ of Certiorari.

JURISDICTION

Respondent adopts the basis for the Court's jurisdiction set forth in the Petition for Writ of Certiorari.

APPLICABLE STATUTES

Respondent agrees with the Petitioners' statement that the statutes involved in this proceeding are the Jones Act, 46 U.S.C.app. § 688 (1988), and the Death on the High Seas Act ("DOHSA"), 46 U.S.C.app. §§ 761-68 (1988). The pertinent provisions of these statutes are quoted in Petitioner's brief.

STATEMENT OF THE CASE

This is a maritime survival action, arising under the general maritime laws of the United States, and stemming from three deaths occurring on the high seas, *i.e.*, more than one marine league (three nautical miles) from shore. The decedents allegedly died while serving as crewmembers aboard the M/V ALEUTIAN ENTERPRISE when that vessel sank on the high seas on March 22, 1990. Petitioners are the personal representatives of the estates of the three unmarried Jones Act seamen who had no dependents. The only item of damages sought by Petitioners under this general maritime

law survival action is lost future earnings of the decedents, also referred to as loss of accumulation of estate.

The owners of the M/V ALEUTIAN ENTERPRISE filed a petition for limitation of liability, 46 U.S.C. §§ 181-189 (1988), in the United States District Court for the Western District of Washington. Petitioners herein filed claims in that limitation proceeding against the owners and the decedents' employer. After settling their claims against the owner of the M/V ALEUTIAN ENTERPRISE and the decedents' employer, Petitioners filed this general maritime law survival action against the Respondent, Bender Shipbuilding and Repair Co., Inc. (hereinafter "Bender"). The Petitioners alleged in their complaint that Bender negligently designed, built and installed components of the M/V ALEUTIAN ENTERPRISE, and that as a result of Bender's negligence, the decedents and their estates were damaged. The complaint states explicitly that this action is a survival action brought under the general maritime law in which the Petitioners seek to recover solely for decedents' lost future earnings and loss of accumulation of estate.

In response to the complaint, Bender filed a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, contending that lost future earnings are not recoverable under a general maritime law survival action arising out of the deaths of Jones Act seamen. On October 14, 1992, the district court entered an order granting Bender's motion to dismiss without issuing an opinion. On October 27, 1992, Petitioners filed their notice of appeal to the United States Court of Appeals for the Ninth Circuit. On June 21, 1994, a panel of the Ninth

Circuit affirmed the district court's dismissal. (*See* Appendix A contained in the Petition for Certiorari.)

SUMMARY OF THE ARGUMENT

The sole issue raised in this case, whether the lost future earnings of deceased Jones Act seamen are recoverable in a general maritime law survival action, is controlled by the Court's recent decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). Petitioners attempt to carve out an exception to *Miles*, the uniformity sought by that decision, and legislative activities in the field of maritime wrongful death, by contending that lost future earnings are recoverable in a general maritime law survival action brought against a non-Jones Act employer. However, this is a distinction without a difference. The Court's holding in *Miles* is clear and without limitation, and the Court did not reach its holding simply by referring to the Jones Act. Rather, the Court looked to DOHSA, the Jones Act, and the vast majority of state survival statutes, and concluded that the only way uniformity in maritime tort law could be achieved was by disallowing recovery for lost future earnings under a general maritime law survival action.

Contrary to Petitioners' assertions, there is no conflict within the circuits with regard to the precise issue raised herein. Indeed, the only two circuits to address this precise issue – the recoverability of lost future earnings through a general maritime law survival action in a non-Jones Act, DOHSA setting – have reached similar results and have denied recovery for this item of damages.

Certiorari is unnecessary to resurrect the issues disposed of by *Miles* and the Court should not exercise its discretionary authority to grant Petitioners' request for a Writ of Certiorari.

ARGUMENT/REASONS WHY THE WRIT SHOULD BE DENIED

I. *MILES V. APEX MARINE CORP.* CONTROLS THE INSTANT CASE, AND CERTIORARI IS NOT NECESSARY TO REVISIT THE ISSUES RAISED HEREIN.

Petitioners concede that neither the Jones Act nor DOHSA would permit recovery for the lost future income of the decedents. (*See* Petition for Writ of Certiorari, at 4). Consequently, an alternative route of recovery for this item of damages was employed, and the general maritime law's purported survival action was invoked as a means to effect such a recovery. Whether or not the general maritime law recognizes a survival action, however, is irrelevant to the issue of what damages can be recovered when statutory schemes are in place which impose limits on available damages. The decedents were seamen who perished upon the high seas and any claims for damages arising out of their deaths are jointly governed by the statutory frameworks of the Jones Act and DOHSA. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 36-37 (1990) (discussing damage limitations contained in Jones Act); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (discussing damage limitations contained in DOHSA).

The Court recently reiterated these principles in *Miles v. Apex Marine Corp.*, another case in the continuing struggle by counsel for similarly situated persons to judicially amend or repeal the provisions of the Jones Act and DOHSA. The holding and reasoning in *Miles* and its predecessor cases from this Court uniformly recognize the need for adherence to the legislation applicable to this area in order to provide uniformity in maritime tort law. *See, e.g., Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

In *Miles*, the Court was again called upon to address the interplay of judicially-created remedies and statutory remedies. *Miles* addressed the sole issue presented in the instant petition, and held that "a general maritime law survival action cannot include recovery for decedent's lost future earnings." *Miles v. Apex Marine Corp.*, 498 U.S. at 37. The petitioner therein, Mercedel Miles, was the mother of a Jones Act seaman killed in an unprovoked attack aboard the M/V ARCHON. She sued Apex Marine Corporation and Westchester Marine Shipping Company, the vessel's operators, Archon Marine Company, the charterer, and Aeron Marine Company, the vessel's owner, under the Jones Act and the general maritime law. *Miles* sought compensation for various damages, including the decedent's lost future wages.

The district court ruled that the decedent's estate could not recover for lost future wages. The Fifth Circuit affirmed that ruling, holding that the general maritime law does not permit a survival action for a decedent's lost future earnings. The Court granted certiorari to review that issue, along with other issues raised in the case which are unrelated to the instant petition.

The Court addressed the precise issue of whether the estate could recover the decedent's lost future earnings through a general maritime law survival action. In addressing that issue, the Court stressed the need for uniformity in maritime tort law. An additional consideration cited by the Court was the fact that lost future income occurring after the decedent's death is not recoverable in a survival action under either DOHSA or the Jones Act. Indeed, DOHSA contains no survival provision and the Jones Act's survival provision limits recovery to losses suffered during the decedent's lifetime. Moreover, the Court observed that the majority of state survival statutes do not allow an estate to recover decedent's lost future income. *Id.* at 35-36. Accordingly, the Court held that a general maritime survival action cannot include recovery for decedent's lost future earnings.

> We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in survival actions that we cannot exceed.
>
> * * *
>
> We will not create, under our admiralty powers, a remedy that is disfavored by a clear majority of the States and that goes well beyond the limits of Congress' ordered system of recovery for seamen's injury and death. Because [the decedent's] estate cannot recover for his lost future income under the Jones Act, it cannot do so under the general maritime law.

> Cognizant of the constitutional relationship between the courts and Congress, we today act in accordance with the uniform plan of maritime tort law Congress created in DOHSA and the Jones Act. We hold that there is a general maritime cause of action for the wrongful death of a seaman, but that damages recoverable in such an action do not include loss of society. We also hold that a general maritime survival action cannot include recovery for decedent's lost future earnings.

Id. at 36-37.

Petitioners' attempt to craft an exception to *Miles*, based on the fact that Bender was not the decedents' Jones Act employer, is not well founded. The Court's holding in *Miles* is clear and without limitation. Indeed, the Court did not reach its holding simply by looking to the Jones Act. Rather, the Court looked to DOHSA, the Jones Act, and the majority of state survival statutes, and concluded that the only way uniformity in maritime tort law could be achieved was by disallowing recovery for lost future earnings under a general maritime law survival action. Clearly, the *Miles* decision, and its predecessor Supreme Court cases, preclude Petitioners from recovering lost future earnings and loss of accumulation of estate under a general maritime survival action.

Contrary to Petitioners' assertions, the holding of *Miles* was not limited to claims brought by the estates of deceased seamen against Jones Act employers. The Court did not draw any distinction between damages recoverable against the Jones Act employer and those recoverable against non-Jones Act employers, even though there were four defendants involved in that case and only one

Jones Act employer. The Petitioners are urging that this Court allow the anomaly of permitting the decedents' estates to recover damages for lost future earnings in a general maritime law survival action against a non-Jones Act employer when that action is not joined with a Jones Act claim, while the recovery of the same damages using the same survival action would be disallowed when that action is joined with a Jones Act claim. Not only does such a result defy logic and common sense, it is antithetical to the uniformity in maritime tort law which the *Miles* decision sought to achieve.

Both the district court and the appellate court below, properly interpreting *Miles*, determined as a matter of law that Petitioners could not recover the lost future income of the decedents under a general maritime law survival action. Contrary to Petitioners' assertions, this reliance on *Miles* was not misplaced, and certiorari should not be granted to resurrect this issue.

II. PETITIONERS MAY NOT RECOVER DAMAGES FOR LOST FUTURE EARNINGS OR LOSS OF ACCUMULATION OF ESTATE UNDER A GENERAL MARITIME LAW SURVIVAL ACTION BECAUSE THE CLAIMS ARISE OUT OF DEATHS ON THE HIGH SEAS.

Petitioners contend that the Court of Appeals erred in affirming the dismissal of Petitioners' complaint on the basis that Respondent was not the Jones Act employer of the decedent seamen, and that the decedents' status as Jones Act seamen should not have been taken into consideration by the court. However, the decedents' status as Jones Act seamen was not the sole determinative factor in

the underlying decisions dismissing the Petitioners' complaint.

Because the decedents perished on the high seas, the statutory framework of DOHSA governs Petitioners' claims and precludes recovery for the decedents lost future earnings. *Miles* clearly established that, by enacting DOHSA, "Congress [spoke] directly to the question of recoverable damages on the high seas, and 'when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that [DOHSA] becomes meaningless.' " *Miles*, 498 U.S. at 31 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). The decision below correctly applied DOHSA and its statutory limits on recoverable damages for actions stemming from deaths on the high seas, regardless of the identity or status of the decedents:

> *Miles* instructs the lower federal courts that a claim for lost future earnings is not available in connection with a maritime death for which Congress has already provided a remedy and has excluded such damages.

Davis v. Bender Shipbuilding & Repair Co., Inc., 27 F.3d 426, 430 (9th Cir. 1994).

The only other Circuit to date that has addressed the recoverability of lost future earnings by a decedent's estate in a non-Jones Act, DOHSA setting held that the general maritime law does not permit recovery of a decedent's lost future earnings in a survival action. *Preston v. Frantz*, 11 F.3d 357, 358 (2d Cir. 1993) (citing *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084 (2d Cir. 1993)).

The plaintiffs in *Preston v. Frantz* were the non-dependent parents of a helicopter passenger who was killed in a crash on the high seas while en route from Connecticut to Nantucket Island. The district court dismissed the plaintiffs' state law claims for survival damages, concluding that Connecticut law, unlike federal maritime law, allows the recovery of lost future earnings in survival actions and was thus inconsistent with and preempted by the survival action under general maritime law. *Preston*, 11 F.3d at 358. Relying on *Wahlstrom v. Kawasaki Heavy Industries, supra*, which was decided while the Prestons' appeal was pending, the Second Circuit affirmed the district court's holding that lost future earnings could not be recovered under a general maritime law survival action. *Preston*, 11 F.3d at 358.

In their effort to overcome the preclusive effects of *Wahlstrom*, the plaintiffs contended that *Wahlstrom* was wrongly decided; *Wahlstrom* relied on *Miles v. Apex Marine Corp.*, and it was argued that *Miles* should be applied only to cases involving Jones Act seamen. The Second Circuit eschewed this reasoning:

> The language of the conclusion in *Miles* is not limited to Jones Act seamen. Further, even if *Miles* were applicable only to Jones Act seamen, it would not render our decision in *Wahlstrom* infirm. "[I]n view of the special regard accorded by admiralty to seamen," *Wahlstrom*, 4 F.3d at 1092, it would be anomalous to allow a nonseaman's estate to recover for lost future wages when a seaman's estate, under *Miles*, would not be entitled to such recovery.

Preston, 11 F.3d at 358 (internal citations omitted); see also *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084 (2d Cir. 1993), where the Second Circuit declined to permit the recovery of lost future earnings pursuant to a general maritime law survival action arising out of a death in state territorial waters:

> The Supreme Court disallowed such a recovery in *Miles*. *See* 498 U.S. at 33-37. The Court's analysis relied heavily upon the decedent's status as a seaman and the resultant applicability of the Jones Act, *see id.* at 35-36, but the announced conclusion of its opinion (unlike the companion ruling as to loss of society) was not confined to seamen. *See id.* at 37 ("We . . . hold that a general maritime survival action cannot include recovery for decedent's lost future earnings.").

Id. at 1093.

The issue of available damages in a non-Jones Act, DOHSA setting was also addressed in *Denniston v. Boeing Company*, 1991 AMC 2080 (N.D. N.Y. 1991). The district court in *Denniston* held that DOHSA preempts a general maritime law survival action for lost future earnings or loss of inheritable estate. Plaintiffs were the administrators of the estates of three non-seamen who died in a helicopter crash on the high seas. A DOHSA action was brought and accompanied by a general maritime law survival action seeking to recover the decedents' lost future earnings. The court found that the incident clearly fell within the field of operation of DOHSA, and that the plaintiffs could not recover, via a general maritime law survival action, an element of damages explicitly precluded by DOHSA:

> [T]his court concludes that on the issue of lost future wages it would be unwise to render a policy decision favorable to the plaintiffs. In contrast to the pain and suffering aspect of a survival claim, the loss of future wages aspect overlaps with damages available in a wrongful death claim. Under the circumstances at bar, the pecuniary losses available under the DOHSA extend into the survival claim for lost future wages. Given that overlap, it is this court's opinion that the DOHSA represents "Congress' considered judgment" on the manner in which a DOHSA decedent's lost future wages may be recovered. As a result, this court is "not free to 'supplement' Congress' answer." Plaintiffs may not maintain a survival claim for the decedents' lost future wages.

Id. at 2097-98 (internal citations omitted). In a footnote, the *Denniston* court went on to note: "Subsequent to the writing of this section of the court's opinion, the Supreme Court in *Miles v. Apex Marine Corp.*, 498 U.S. [19], 1991 AMC 1 (November 6, 1990), also held that in a general maritime survival action the estate cannot recover a decedent's lost future earnings." *Id.* at 2098, n.13.

In support of their contention that the Respondent's status as a non-Jones Act employer should permit the recovery of lost future earnings pursuant to a general maritime law survival action, Petitioners rely on the following cases: *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994); *Sugden v. Puget Sound Tug & Barge Co.*, 796 F.2d 455 (W.D. Wash. 1992); *Rebstock v. Sonat Offshore Drilling*, 764 F.Supp. 75 (E.D. La. 1991); *Garner v. Dravo Basic Materials Co.*, 768 F.Supp. 192 (S.D. W.Va. 1991); and *Mussa v. Cleveland Tankers*, 802 F.Supp. 88 (E.D. Mich. 1992). These

cases are distinguishable from the instant case, and, as demonstrated below, Petitioners' reliance upon them is totally misplaced.

In *Sugden* and *Rebstock*, the plaintiffs sought to recover non-pecuniary loss of society damages for wrongful deaths which occurred in state waters, not on the high seas. Unlike the instant case, the statutory workings of DOHSA were not specifically applicable in those cases. Indeed, the courts in *Sugden* and *Rebstock* clearly implied that had DOHSA or another federal statute been applicable, they would have held that *Miles* would have precluded the loss of society claims. *See Sugden*, 796 F.Supp at 457; *Rebstock*, 764 F.Supp. at 76. Similarly, Petitioners' reliance on *Sutton* is misplaced as the wrongful death involved therein also occurred in state waters where DOHSA's statutory limits on recoverable damages are not specifically applicable. *See Sutton*, 26 F.3d at 916.

Contrary to Petitioners' assertion, *Garner v. Dravo Basic Materials Co., supra*, did not involve a general maritime law survival action. Instead, the issue in that case was whether lost future earnings were recoverable under a general maritime law wrongful death action. Moreover, and similar to the inapposite cases of *Sutton, Sugden* and *Rebstock* distinguished *supra, Garner* involved a wrongful death that occurred in state waters, not on the high seas. Unlike the instant case, the effects of the Jones Act and DOHSA were not specifically applicable in *Garner* and no concern for uniformity with existing federal statutes existed. The *Garner* court, however, made it quite clear that had DOHSA been applicable, plaintiff's recovery would have had to have been uniform and consistent with that statute. *See Garner*, 768 F.Supp. at 194-95.

Finally, the Petitioners' reliance on *Mussa v. Cleveland Tankers, supra,* is also misplaced. Again, unlike the instant case, the effect of DOHSA on available damages was not specifically addressed in *Mussa* and no concern for uniformity with an existing federal statute existed. Furthermore, and equally important, the *Mussa* case did not address whether lost future earnings are recoverable under a general maritime law survival action. In fact, the *Mussa* case involved claims arising out of a personal injury, not a wrongful death, and therefore did not address any issue related to general maritime law survival claims. *See Mussa,* 802 F.Supp. at 89-90.

In sum, the effect of DOHSA on recoverable damages was not an issue in any of the cases relied upon by the Petitioners. The district court and the appellate court in the instant case properly applied *Miles* in holding that the Petitioners could not skirt DOHSA's limits on damages through the use of a judicially-crafted remedy, regardless of the identity or status (e.g. non-Jones Act employer) of the targeted defendant. To draw such a distinction defies logic and common sense, and runs contrary to the desire for uniformity in maritime tort law which *Miles* sought to achieve.

Likewise, Petitioners err in stating that the Ninth Circuit's decision was premised on the conclusion that DOHSA preempts general maritime law survival claims. Taking their cue from the Court's decision to fashion a general maritime wrongful death action, *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375 (1970), some lower federal courts have acknowledged the existence of a general maritime law survival action. *See, e.g., Law v. Sea Drilling Corp.,* 523 F.2d 793 (5th Cir. 1975); *Spiller v. Thomas M.*

Lowe, Jr. & Assocs., Inc., 466 F.2d 903 (8th Cir. 1972). The Petitioner in *Miles* urged the Court to recognize a general maritime law survival right. The Court declined to address this issue "because its resolution is unnecessary to [our] decision on the narrow question presented: whether the income decedent would have earned but for his death is recoverable. We hold that it is not." *Miles*, 498 U.S. at 34.

Like the Court in *Miles*, the Ninth Circuit in the instant case held that the decedents' estates could not recover for this item of damages. Additionally, and again in parallel fashion to *Miles*, it was unnecessary for the Ninth Circuit in the instant case to reach the issue of the existence *vel non* of a general maritime law survival action. Indeed, the Ninth Circuit did not address this issue at any point in its decision below. Despite Petitioners' efforts to characterize their claims as general maritime law survival actions, the appellate court recognized that it sailed in waters occupied by DOHSA, and was thereby precluded from expanding the remedies available under this statutory scheme. *Compare Davis*, 27 F.3d at 430 (Petitioners denied recovery for loss of future income because "DOHSA does not permit such damages . . . . ") *with Sutton v. Earles*, 26 F.3d 903, 919-20 (9th Cir. 1994) (Recovery of lost future earnings permitted because there was no applicable federal statute imposing a similar damage limitation).

III. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER UNITED STATES COURT OF APPEALS OR STATE COURT OF LAST RESORT.

In an effort to bring their Petition for Writ of Certiorari within the ambit of Rule 10, Sup. Ct. R., the Petitioners assert that the decision of the Ninth Circuit is in conflict with decisions of the Ninth Circuit itself, the Fifth Circuit Court of Appeals, and numerous decisions of the federal district courts. It should be noted initially that conflicts among the district courts do not generally support the exercise of the Court's discretion in a petition for certiorari. *See* Sup. Ct. R. 10.1. Likewise, an intra-circuit split, which the Petitioners allege to exist within the Ninth Circuit, is fodder for en banc consideration, not discretionary review by the Court. Moreover, respondent submits that no intra-circuit split exists in the Ninth Circuit, and that the case of *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994), is not at odds with the results reached in the instant case. Because the incident in *Sutton* occurred in territorial waters, the limitations of DOHSA – which are implicated in the instant case – did not play a role in the Ninth Circuit's decision.

The Petitioners' contention that the instant decision is in conflict with *Azzopardi v. Ocean Drilling & Exploration Corp.*, 742 F.2d 890 (5th Cir. 1984), is without merit. First, the alleged "conflict" is premised upon the Petitioners' assertion that the Ninth Circuit in the instant case held that DOHSA preempts a general maritime law survival claim. As discussed *supra*, the Ninth Circuit did not reach the issue of the preemptive effects of DOHSA on the right

to assert a general maritime law survival action. Just as the Court in *Miles* found it unnecessary to reach the issue of the existence *vel non* of a general maritime law survival action, the appellate court below only reached the issue of whether an item of damages – lost future earnings or loss of accumulation of estate – was recoverable in a general maritime law survival action stemming from deaths occurring on the high seas.

Additionally, the Petitioners' attempt to manufacture a conflict between the Ninth and Fifth Circuits should be viewed in context of intervening precedents. Although the Fifth Circuit in *Azzopardi* held that the plaintiff could supplement DOHSA with a general maritime survival action for pre-death pain and suffering experienced by the decedent, the Fifth Circuit did not address in that case whether the plaintiff could recover lost future earnings in a general maritime law survival action. The Fifth Circuit in *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989), *aff'd*, 498 U.S. 19 (1990), and the Supreme Court in *Miles v. Apex Marine Corp.*, *supra*, have clearly limited the effect of *Azzopardi* by holding that lost future earnings are not recoverable under a general maritime law survival action. Therefore, the alleged inter-circuit conflict cited by the Petitioners does not exist.

Moreover, the only two circuits that have directly addressed the issue presented here have reached uniform results. Both the Second Circuit in *Preston v. Frantz*, 11 F.3d 357 (2d Cir. 1993) and the Ninth Circuit in the instant case have held that lost future earnings are not available in a general maritime law survival action arising from deaths on the high seas. Instead of conflict among the

circuits as alleged by the Petitioners, there is uniformity with respect to the precise issue presented herein.

CONCLUSION

Relying on *Miles v. Apex Marine Corp.*, the courts below correctly held that, as a matter of law, the Petitioners could not recover the decedents' lost future earnings or loss of accumulation of estate in a general maritime survival action. In this Petition for Writ of Certiorari, the Petitioners have not shown any valid basis which would warrant the Court's exercising its discretionary authority, through the grant of certiorari, to revisit the issues previously decided by *Miles*. Therefore, the instant Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

BLANE H. CRUTCHFIELD*
BRIAN P. MCCARTHY
*Counsel of Record

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
Post Office Box 123
Mobile, Alabama 36601
Phone: (205) 432-5511

Attorneys for Respondents